U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 21Mar2002

Case No.: 2002-INA-72

In the Matter of:

HINES INTEREST LTD.,
Employer,

on behalf of

CLIFTON LEE VAN ON,
Alien

Appearances: Gordon Quan, Esq.
Houston, Texas
For Employer

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Clifton Lee Van On ("Alien") filed by Hines Interest Ltd. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written argument of the parties.

STATEMENT OF THE CASE

On April 11, 1997, the Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Domestic Cook.[1] The job to be performed was described as follows:

> Confer with employer to develop weekly menu for family in private household. Prepare wide variety of dishes including low fat, vegetarian and macrobiotic dishes for special diet as well as entrees, hor d'oeuvres and pates, appetizers, soups, salads and desserts for other family members. Prepare special menus and create appropriate dishes. Select and purchase all supplies. Prepare seasonings, sauces and glazes. Cut and puree foods.

(AF 44-45). Total hours of employment were listed as 40 hours a week, from 8:00 a.m. to 1:00 p.m., and 5:00 p.m. to 8:00 p.m. The rate of pay was $1,900 a month. Minimum requirements for the position were listed as two years experience in the job offered, or two years as a first cook.

On April 14, 1998, the Texas Workforce Commission notified the Employer that the appropriate DOT code was 305.281-010, Domestic Cook, with an SVP of 6, not to exceed a total of 2 years. The Employer was instructed to modify the education/training/experience requirement or provide documentation to support the necessity for the excessive SVP requirement (AF 46).

On May 29, 1998, the Employer submitted amended ETA-750 forms, changing the job title to Domestic Cook, and deleting supervisory duties and educational requirements originally listed. The Employer also requested a Schedule B waiver, attaching a letter certifying that the Alien had two years of full-time employment as a domestic cook (AF 43-44).

On February 17, 1999, the CO issued a Notice of Findings (NOF) proposing to deny certification, citing 20 C.F.R. §§ 656.3, 656.20(c), and 656.20(c)(8). Noting that the Employer claimed to have several estates, and to require several full-time staff, the CO stated that the duties as described on the ETA-750A did not appear to constitute full-time employment in the context of the Employer's household. The Employer was directed to respond with evidence or documentation to a specific list of questions designed to establish whether a full-time position existed in the Employer's household.

Citing Section 656.21(b)(6), the CO also noted that if U.S. workers had applied for the job opportunity, the Employer was required to document that they were rejected solely for lawful job-related reasons. The CO stated that of the three applicants referred by the Texas Workforce Commission, two, Mr. Pelcher and Mr. Ramos, were qualified, and that a review of their resumes showed that they met the Employer's minimum job qualifications as set forth on the ETA 750A. Thus,

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[1] The original application is not in the appeal file; apparently the position was originally classified as a hotel and restaurant cook.

the Employer was obligated to consider them for the job opportunity, and the Employer was required to provide lawful, job-related reasons if the applicants were rejected. The Employer was instructed to reconsider Mr. Pelcher and Mr. Ramos, and provide bona fide, job-related reasons for rejecting them. The CO noted that the Employer's recruitment report stated that Mr. Ramos was not willing to accept the position as offered, but the Employer did not provide documentation to support this claim. The CO stated that the Employer must submit a signed statement from Mr. Ramos, confirming that he was not willing to accept the position as offered.

The CO instructed the Employer to provide a new report of recruitment results, with lawful, job-related reasons for rejecting Mr. Pelcher and Mr. Ramos, if they were not hired. The CO specifically stated that the Employer must submit proof of contacting the applicants, such as certified mail receipts. The CO noted that the rejection of a worker must be based on the minimum job requirements set forth on the ETA 750A.

The CO stated:

> Consideration of each applicant must be based on the applicants availability at the initial time of application for the job opportunity. Any assertions made by the employer, such as "not willing to accept the position as offered" must be accompanied by documentation to support the claim.

(AF 15-19).

In Rebuttal, the Employer provided a letter from counsel, indicating that the Employer was one of the "Most Powerful Texans," and directed a company with a portfolio valued at over $8 billion. Counsel indicated that the Employer's primary residence was an estate in a prestigious area of Houston. For over twenty years, they had employed a full-time cook on staff to prepare meals for the family; a new cook was sought due to the resignation of their current cook. Counsel attached a letter from Mark Janssen, the Employer's Estate Manager, addressing the questions set out in the NOF. Mr. Janssen stated that in his position as Estate Manager, he was responsible for staffing the Employer's primary residence in Houston, Texas. The full-time staff included a housekeeper, gardener, cook, and household manager, as well as a part-time housekeeper and laundry person. Employees were paid through a contract with the Hines Interest Ltd. partnership.

Mr. Janssen stated that the position of cook was a full-time position, and had been for over twenty years. The household included the Employer and his wife, and two children, ages 11 and 13. He indicated that the cook prepared meals for all family members, and was responsible for purchasing all supplies. These were the cook's sole duties; other staff members handled other duties. While the number of meals varied with each person's schedule, the cook was required to be on call to prepare meals on demand. According to Mr. Janssen, the Employer used caterers for large, special occasions. The cook was on call to prepare meals for the family and for small gatherings. Mr. Janssen stated that the two children attended private school from 7:30 a.m. to 4:00 p.m., and that a nanny had

responsibility for their care. Mr. Janssen indicated that the Employer maintained an active business schedule, with projects throughout the world, and that his wife served on various community boards, and also had an active social life. He indicated that it was difficult to set a regular schedule. He also stated: "We respectfully decline to provide any details of his private life and schedule for security purposes."

Mr. Janssen attached a response letter signed by Mr. Ramos, confirming that he was not interested in the position because the salary was too low. Mr. Janssen also stated that he interviewed Mr. Pelcher, and explained all the duties of the position. Mr. Pelcher was not familiar with the preparation of low fat, vegetarian and macrobiotic dishes, and would require training in this type of food preparation. However, the Employer needed a cook who could immediately perform the duties of the position, and thus Mr. Pelcher was not offered the job (AF 8-13).

The CO issued her Final Determination (FD) on June 7, 1999, denying the request for certification, on the grounds that the Employer did not provide any specifics or documentation to clearly establish that the person in this position would be fully engaged in cooking and related food preparation duties for forty hours a week. The CO noted that the Employer did not provide any of the requested information regarding how long each meal takes to be prepared, or the work schedule of the parents. Nor did the Employer submit the dates of the entertainment, or the number of meals that would be served, or an explanation of who has performed the duties of a household cook since the resignation of the previous cook. The CO did not find that the Employer's documentation was convincing in establishing that the position was full-time (AF 6-7).

On July 12, 1999, the Employer submitted a Motion for Reconsideration, on the grounds that the NOF was not clear, explicit, and informative, and did not explain how the Employer failed to show a bona fide job opportunity pursuant to 20 C.F.R. § 656.20(c)(8). The Employer argued that the CO abused administrative due process by relying solely on 20 C.F.R. § 656.3, by denying certification because Employer failed to establish that the job duties would keep the worker occupied for a substantial part of the work week. The Employer argued that the work day was customary for a full-time domestic cook (AF 2-3).

On August 31, 1999, the Motion for Reconsideration was denied, as it addressed issues fully disposed of in the Final Determination, and the file was sent to the Board of Alien Labor Certification Appeals (Board) (AF 1).

The matter was transmitted to the Board on January 23, 2002, and docketed on January 28, 2002.

DISCUSSION

Section 656.3 provides that "employment" means permanent, full-time work by an employee

for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc*., 1988-INA- 344 (Dec. 16, 1988).

Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. This regulation means that the job opportunity must be bonafide, and that the job opening as described on Form ETA 750, actually exists and is open to U.S. workers.

The Employer has the burden of satisfactorily responding to or rebutting all findings in the NOF. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Where the CO requests documents or information with a direct bearing on the resolution of an issue and which is obtainable by reasonable effort, the employer must provide it. *Gencorp,* 1987-INA-659 (January 13, 1988) (*en banc*).

Employer was instructed in the NOF to establish that the job offer met the definition of "employment" by providing evidence that the position as performed in the household clearly constitutes full-time employment. The Employer was specifically notified that the evidence or documentation must consist of data to support each assertion or conclusion, and must include, at a minimum, responses to a specific list of questions. However, as noted by the CO in the FD, the Employer did not provide any specifics or documentation about how long each meal took to be prepared, or the work schedule of the parents. Nor did the Employer provide the dates of the entertainment, the number of meals that would be served, or an explanation of who performed the duties of household cook since the resignation of Susan Parent before the Alien Certification application was filed. In short, the Employer did not provide information or documentation to clearly establish that the person in this position would be fully engaged in cooking and related food preparation duties for 40 hours a week.

Indeed, the information that the Employer did provide shows that the Employer has two children in school from 7:30 a.m. until 4:00 p.m., that Mr. Hines has an active business schedule, with projects throughout the world, and that Mrs. Hines serves on various community boards and has an active social life. The reasonable inference to be drawn from this information is that the family members are not home for a substantial number of meals.

In *Carlos Uy III*, 1997-INA-304 (Mar. 3 1999) (*en banc*), the Board set forth a "totality of circumstances" test to be used in order to determine the bona fides of a job opportunity in domestic cook applications. As stated by the Board in *Uy*:

> The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe the position; what reasons are present for believing or doubting the employer's veracity for the accuracy of the employer's assertions; and whether the employer's statements are supported by

independent verification.

Id.

Employer argues that the CO

> abused administrative due process because the NOF was not clear, explicit and informative, in that the CO did not explain how Hines Interest Ltd. ("Employer") allegedly failed to show a *bona fide* job opportunity pursuant to 20 C.F.R. § 656.20(c)(8). The context of the CO's NOF deals exclusively with an alleged 20 C.F.R. § 656.3 violation. Accordingly, the CO's NOF was patently erroneous.

(AF 2). To the contrary, the NOF, which cited to both 20 C.F.R. §§ 656.3 and 20(c)(8), asked for detailed and specific documentation; the NOF was clear, and provided specific information to the Employer of the regulatory violations found. The Employer is correct that the analysis under *Carlos Uy, supra,* requires more than just an analysis of whether the duties will occupy the worker full time. But viewing the NOF in context, as well as the fact that the CO specifically cited to these regulatory sections, it is clear that the NOF raised both § 656.3 and § 656.20(c)(8) violations.

As noted by the Board in *Carlos Uy, supra,*

> Although the NOF must put the employer on notice of why the CO is proposing to deny certification, it is not intended to be a decision and order that makes extensive legal findings and discusses all evidence submitted to the file. The CO is not required to provide a detailed guide to the employer on how to achieve labor certification. The burden is placed on the employer by the statute and regulations to produce enough evidence to support its application. Case law has established that to provide adequate notice, the CO need only identify the section or subsection allegedly violated and the nature of the violation, *Flemah, Inc.,* 1988-INA-62 (February 21, 1989)(*en banc*); inform the employer of the evidence supporting the challenge, *Shaw's Crab House,* 1987-INA-714 (September 30, 1988)(*en banc*), and provide instructions for rebutting and curing the violation, *Peter Hsieh,* 1988-INA-540 (November 30, 1989).

Id. at 7, fn. 9.

Here, the NOF clearly put the Employer on notice of why the CO proposed to deny certification, both by citing to the relevant regulatory provisions, and specifically enumerating the documentation that the Employer was required to provide. The Employer chose to provide vague and generalized statements that did not answer the questions posed by the CO.

The burden of proof for obtaining labor certification lies with the Employer under § 656.2(b). Viewing the evidence as a whole, it is clear that the Employer failed to meet its burden. The CO's

reasoning clearly shows that she conducted a totality of the circumstances analysis in reaching her conclusions, and her findings clearly show that he was correct in determining that certification should be denied.[2]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

For the panel:

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LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

[2] It is not significant that in the FD, the CO cited only to § 656.3, as both the NOF and the FD reflect that the CO considered the totality of the circumstances in denying the application.